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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-178

WILLARD E. ROBERTSON,

Petitioner,

v.

EDWARD F. WEGMANN, Executor for Clay L. Shaw, et al.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law, proposed *amicus curiae* herein, respectfully seeks leave of this Court to file the attached brief in order to assist the Court in resolving an important issue of survival of actions brought under federal civil rights statutes. In the attached brief, *amicus* discusses the varied authority of federal courts to look beyond state law provisions in order to achieve the ends of federal policy in suits to enforce federal rights, in cases involving both civil rights and other subject matter. The instant case presents the sort of issue which arises frequently in civil rights litigation, including particularly actions for damages suffered by reason of police or other official misconduct, and this Court's ruling on the survival question presented here will have an important bearing on the disposition of such actions. *Amicus* does not believe that the generic nature of the questions presented in this case will be adequately

addressed by the parties, because in the papers filed with the Court to date, they have discussed only the narrow problem created by Clay Shaw's death, and because neither party is represented by counsel who frequently litigate civil rights actions, to the best of *amicus'* knowledge.

The interest of *amicus* in this case grows out of its longstanding concern with the problem of devising remedies that will secure the effective enforcement of federal civil rights laws, and is more fully described *infra* pp. 1-3.

Amicus has sought consent of the parties to the filing of this brief, without success.

WHEREFORE, the Lawyers' Committee for Civil Rights Under Law respectfully moves that its brief be filed in this case.

Respectfully submitted,

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE*

INTEREST OF *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. The Committee's membership today includes two former Attorneys General, ten past Presidents of the American Bar Association, two former Solicitors General, a number of law school deans, and many of the nation's leading lawyers. Through its national office in Washington, D.C., and its offices in Jackson, Mississippi, and eight other cities, the Lawyers' Committee over the past fourteen years has enlisted the services of over a thousand members of the private bar in addressing the legal problems of minorities and the poor in voting, education, employment, housing, municipal services, the administration of justice, and law enforcement.

The Lawyers' Committee has been actively involved in a wide variety of litigation on behalf of minority-race persons seeking redress for unconstitutional conduct committed under color of state law; the vast preponderance of this litigation has been brought in federal courts pursuant to the provisions of 42 U.S.C. § 1983.[1] The Committee's experience is that broad principles of relief are essential to the fulfillment of that statute's goals: principally, the compensation of the victims of unconstitutional action and the deterrence of like misconduct in the future.

Because the federal Civil Rights Acts do not furnish standards for the disposition of every matter arising in the course of the litigation which they authorize, historically the federal courts have engaged in interstitial lawmaking through incorporation of state law or creation of federal common law. This practice is given explicit statutory sanction by 42 U.S.C. § 1988.

The flexibility which § 1988 affords federal trial courts to shape their procedures and remedies in accord with the underlying policy of the Civil Rights Acts is indispensable to effective redress for constitutional wrongs. *Amicus* is therefore concerned by the Petitioner's suggestions that § 1988 should be given a cramped interpretation, restricting federal courts to state law alone on matters of procedure and remedy arising in civil rights suits.

Of particular importance to *amicus* is the availability of an effective federal remedy for police misconduct and brutality. This interest led the Lawyers' Committee (along with other *amici*) last Term to file a brief in

[1] The Committee has also filed amicus briefs with this Court in a number of § 1983 cases, including *Huttto* v. *Finney*, No. 76-1660 (pending); *Monell* v. *Department of Social Services*, No. 75-1914 (pending); *Jones* v. *Hildebrant*, 432 U.S. 183 (1977); *Rizzo* v. *Goode*, 423 U.S. 362 (1976); and *Warth* v. *Seldin*, 422 U.S. 490 (1975).

Jones v. *Hildebrant*, 432 U.S. 183 (1977). There, the mother of a youth shot and killed by a Denver policeman sought to recover damages for his death in a state court action based, alternatively, upon 42 U.S.C. § 1983. The Colorado Supreme Court held that the state's "wrongful death" statute would be "borrowed" in a suit on the federal claim, but that as a result, any damage recovery would be limited by Colorado's "net pecuniary loss" rule applied in state wrongful death suits. We argued that the state's limitation on damages was ill-suited to afford complete justice as § 1983 required, and therefore it should not be incorporated in any "borrowing" of the state's wrongful death statute under 42 U.S.C. § 1988. Alternatively, we urged this Court to sustain a federal common law of wrongful death in civil rights actions as it had done in admiralty, in *Moragne* v. *States Marine Lines*, 398 U.S. 375 (1970).[2]

The instant case involves a state "survival" statute, which can also play a major role in lawsuits to recover damages for police misconduct which maims or causes death. Acceptance of the argument which Petitioner advances would have consequences extending far beyond the facts of this case, which we discuss below. We file in this matter, therefore, to emphasize the critical importance of sustaining the federal courts' *authority* to reject state law, when to apply it would undermine substantial federal concerns—whatever the merits of any particular exercise of that authority. We are also satisfied that the rejection of Louisiana's survival statute in this case was proper.

[2] After oral argument, this Court dismissed the writ of certiorari as improvidently granted, as it had become clear that the Petitioner in *Jones* was not seeking damages for the injury to and killing of her son, but rather damages for deprivation of her claimed parental interest in the life of her son. 432 U.S. at 189.

STATEMENT

The facts relevant to the issues presented to this Court are few, and are not in any dispute. In March of 1967, the original plaintiff in this action Clay Shaw was indicted by an Orleans Parish, Louisiana grand jury on a charge of conspiracy to murder President John F. Kennedy. The indictment followed Shaw's arrest and the public announcement of the charge by then Parish District Attorney Jim Garrison, one of the defendants in this action, and a preliminary hearing in state court. *Shaw* v. *Garrison*, 293 F.Supp. 937, 939 (E.D. La.), *aff'd* 393 U.S. 220 (1968); *id.*, 328 F. Supp. 390, 394 (E.D. La. 1971). In 1968 Shaw sued Garrison before a three-judge federal district court, seeking declaratory and injunctive relief to restrain his further prosecution on the conspiracy charge. The Court granted Garrison's motion for summary judgment, holding that no grounds for federal court interference with the pending state prosecution had been alleged. *Shaw* v. *Garrison*, 293 F. Supp. 937 (E.D. La.), *aff'd* 393 U.S. 220 (1968).[3]

On March 1, 1969, a state court jury unanimously found Shaw not guilty of the conspiracy charge. *Shaw* v. *Garrison*, *supra*, 328 F. Supp. at 399. The following day, Garrison filed an information charging Shaw with perjury. *Id.* at 399-400. Before that charge could be tried, in 1971 Shaw sought and obtained a federal court injunction against his further prosecution, based on an explicit finding of bad faith by Garrison sufficient to bring the case within the exceptional circumstances rule of *Younger* v. *Harris*, 401 U.S. 37 (1971). *Shaw* v. *Garrison*, 328 F. Supp. 390 (E.D. La. 1971), *aff'd* 467 F.2d 113 (5th Cir.), *cert. denied*, 409 U.S. 1024 (1972).

[3] The district court's opinion declining to entertain the 1968 action correctly anticipated much of this Court's reasoning in *Younger* v. *Harris*, 401 U.S. 37 (1971) and *Samuels* v. *Mackell*, 401 U.S. 66 (1971).

In the meantime, Shaw had in February 1970 filed this civil rights damages action against Garrison and other co-defendants (including Petitioner Robertson) with whom Garrison was alleged to have conspired to harass Shaw and deprive him of his constitutional rights. *Shaw* v. *Garrison*, 391 F. Supp. 1353, 1355 (E.D. La. 1975), *aff'd* 545 F.2d 980 (5th Cir. 1977), *cert. granted*, 46 U.S.L.W. 3373 (December 5, 1977). Before the action was tried, Shaw died on August 15, 1974, "survived by neither spouse, children, parents, nor siblings." *Id.*, 391 F. Supp. at 1356. Several of the defendants, including Petitioner, thereupon moved to dismiss the action on the ground that under Louisiana law it abated with Shaw's death. Shaw's executor sought to be substituted as plaintiff.[4] After receiving briefs, the trial court agreed that the action would abate under Louisiana law, but held that 42 U.S.C. § 1988 authorized "the creation of a federal common law of survival in civil rights actions in favor of the personal representative of the deceased" in order to give effect to "the policies underlying the civil rights laws and [this] Court's treatment of survival of actions in analogous contexts." *Id.*, 391 F. Supp. at 1368. The Fifth Circuit agreed, and its judgment affirming the trial court's denial of the motions to dismiss is the subject of this Court's present review.

SUMMARY OF ARGUMENT

I

A. Where necessary to give effect to the congressional purpose underlying the Reconstruction Civil Rights Acts, 42 U.S.C. § 1988 authorizes federal courts in civil rights actions to look beyond the provisions of state laws governing matters of remedy and procedure. The plain

[4] Shaw left a valid will naming a friend as residuary legatee of his estate. Petition for Certiorari, at 4.

language of the statute, the debates of the 39th Congress which enacted it, and the very justification for affording a *federal* remedy for deprivations of constitutional rights, all support this power for the federal courts.

B. Even in circumstances where state law is generally held to govern, this Court has consistently interpreted the Rules of Decision Act (Section 34 of the first Judiciary Act) and Section 1988 to allow the federal courts to look beyond state law provisions when their application would produce results inconsistent with the purposes of federal law.

II

The lower court's exercise of the authority in this case is fully proper. Under either § 1988 or the inherent choice-of-laws responsibility of federal courts, there is no *per se* incorporation of state law. Rather, its applicability depends upon its appropriateness to give effect to the underlying federal policies. Here, the deliberate action of the Reconstruction Congresses creating a federal court cause of action in order to deter deprivations of constitutional rights by those acting under color of state law requires that Louisiana's limitation on survival of state-created claims be displaced.

ARGUMENT

Introduction

This case presents a relatively narrow issue: whether the courts below correctly exercised their authority under 42 U.S.C. § 1988 by holding, as a matter of interstitial federal common law, that this damage action under the Ku Klux Act of 1871[5] survived after the plaintiff's

[5] The relevant portion of the Act is now codified at 42 U.S.C. § 1983.

death, in favor of his residuary legatee or executor. However, the arguments made in Petitioner's brief implicate broader questions of federal judicial power under the Reconstruction era civil rights statutes.[6] It would be inappropriate to consider these questions solely in the factual context presented by the matter before the Court; yet Petitioner's analysis neither reserves nor fully treats them. In the discussion which follows, we accordingly show first, that federal courts are authorized, in civil rights cases brought pursuant to 42 U.S.C. §§ 1981-86, to look beyond the law of the state in which the trial court sits to discover applicable rules of law governing procedural and remedial questions not explicitly addressed by these Reconstruction era statutes; and second, that such authority was correctly exercised in the case and on the issue presently before the Court. Even if the Court were to disagree with our second point, therefore, it should not announce any general limitation on the power of federal trial judges to effectuate federal policy, in appropriate cases, by selecting non-state procedural or remedial legal doctrines which best fulfill the federal purpose which gives rise to the cause of action. *Cf. Sullivan* v. *Little Hunting Park*, 396 U.S. 229 (1969).

[6] These questions recur frequently in federal civil rights litigation but generally have not troubled the lower federal courts. Yet they are central to the effectiveness of the federal remedy for constitutional deprivations which is established by the Reconstruction era civil rights statutes. *See generally Mitchum* v. *Foster*, 408 U.S. 225 (1972).

I

Federal Courts Are Not Bound To Apply Only State Law To The Innumerable Procedural And Remedial Questions Which Arise In The Course Of Litigation But Which Are Not Specifically Addressed By Federal Statute.

A. *In civil rights actions, 42 U.S.C. § 1988 is an explicit congressional authorization to employ that combination of federal and state statutory and "common law" which best serves to fulfill the remedial and deterrent purposes of federal civil rights statutes.*

As this Court has noted, federal civil rights statutes—particularly those dating from the Reconstruction era—lack all of the specific provisions necessary to delimit precisely the contours of the remedial causes of action which they have been held to create.

> [I]nevitably existing federal law will not cover every issue that may arise in the context of a federal civil rights action.

Moor v. *County of Alameda*, 411 U.S. 693, 702 (1973).[7] As a result, in such suits the courts themselves must

[7] *See Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 414 n.14 (1968) (noting silence of 42 U.S.C. § 1982 with respect to recovery of damages); *Sullivan* v. *Little Hunting Park*, 396 U.S. 229, 238-40 (1969) (creating damage remedy under § 1982 to provide "an effective equitable remedy"); *Mitchum* v. *Foster*, 407 U.S. 225 (1972) (holding that 42 U.S.C. § 1983 is "expressly authorized" exception to 28 U.S.C. § 2283 despite absence of specific statutory language on point); *cf. Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 413-21 (1975) (holding that plaintiffs in cases under Title VII of the 1964 Civil Rights Act who prove employment discrimination should ordinarily receive back pay, although statute merely authorizes such remedy); *Northcross* v. *Board of Educ.*, 412 U.S. 427 (1973) (successful plaintiff in action to desegregate schools should "ordinarily" recover attorneys' fees under provision of Emergency School Aid Act of 1972 authorizing award in discretion of court); *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400 (1968) (same; Title II of Civil Rights Act of 1964).

provide answers to various procedural and remedial questions as they arise. In so doing, the courts are guided by the national policy expressed in the federal civil rights laws, which are to be "accord[ed] a sweep as broad as [their] language." *Griffin* v. *Breckenridge*, 403 U.S. 88, 97 (1971), quoting from *United States* v. *Price*, 383 U.S. 787, 801 (1966). Federal courts are quick to adjust their procedures to the task.[8]

42 U.S.C. § 1988 (originally Section 3 of the Civil Rights Act of 1866, 14 Stat. 27) requires no less.[9] It instructs that in civil rights matters, whenever federal statutes are "deficient in the provisions necessary to furnish suitable remedies," the courts shall apply the "common law" as modified by statutes of the forum state if it is not "inconsistent with the Constitution and laws of the

[8] *E.g.*, *Sanders* v. *Russell*, 401 F.2d 241 (5th Cir. 1968) (admission of out-of-state attorneys); *Brown* v. *City of Meridian*, 356 F.2d 602 (5th Cir. 1966) (acceptance of joint removal petitions); *Lefton* v. *City of Hattiesburg*, 333 F.2d 380 (5th Cir. 1964) (same); *United States* v. *Mayton*, 335 F.2d 153 (5th Cir. 1964) (registration of voters).

[9] 42 U.S.C. § 1988 provided as follows prior to its 1976 amendment by the Civil Rights Attorney's Fees Awards Act, P.L. 94-559 (October 19, 1976), 90 Stat. 2641, in respects not here relevant:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

United States." § 1988 has been construed by this Court to permit resort to either federal *or* state rules on damages, "whichever better serves the policies expressed in the federal statutes," *Sullivan* v. *Little Hunting Park*, *supra*, 396 U.S. at 240. Thus, the plain language of the statute and its construction by this Court support the power questioned in this case, to look beyond Louisiana law on survival of actions so as to fulfill the purposes of the civil rights acts.[10]

There is nothing startling about this proposition when § 3 of the 1866 Act [11] is considered in the context of the practices of many state courts at the time of its passage. The debates in the 39th Congress contain repeated references—by both supporters and opponents of the bill—to state statutes limiting or abrogating the testimonial capacity of Black witnesses, or denying Blacks the right to bring suit. *See* CONG. GLOBE, 39th Cong., 1st Sess. 478-79, 602, 1121-22, 1151-52, 1156-57, 1159, 1260, 1265, 1270, 1293, 1759, 1777, 1783, 1809, 1832-33, Appendix

[10] Petitioner apparently concedes the point; the only distinction of *Sullivan* urged in his brief is that in *Sullivan* there was an extant "federal rule" to choose, while Petitioner contends there was no "federal rule" applicable to this case until one was created by the courts below. Pet. Br. at 18-19.

[11] § 1 of the 1866 Act, declaring the rights of citizens, is now codified at 42 U.S.C. §§ 1981, 1982. § 2 of the Act made it a criminal offense to deprive persons of those rights under color of state law, and is currently codified at 18 U.S.C. § 242. § 3 of the Act, in its original version, provided for federal jurisdiction "exclusively of the courts of the several states" as to criminal cases brought pursuant to § 2, and also provided for removal of cases from state to federal court in specified circumstances; it then contained the language now codified at 42 U.S.C. § 1988 and quoted in note 9 *supra*.

The entire 1866 Act was re-enacted, following passage of the Fourteenth Amendment, by § 18 of the Enforcement Act of May 31, 1870, 16 Stat. 140. In 1874 the revisers (*see generally Runyon* v. *McCrary*, 427 U.S. 160, 168 n.8 (1976)) made § 1988 applicable to all civil rights legislation. REV. STAT. § 722.

pp. 157-58, 182 (1866). This Act was clearly understood to invalidate such laws and to authorize criminal prosecution of state judges and other officials who sought to enforce them:

> I will not therefore attempt a full discussion of [the Act] now, but content myself with briefly presenting some of the grounds upon which I will again perform the proudest act of my political life in voting to make this bill the law of the land.
>
> It is scarcely less to the people of this country than Magna Charta was to the people of England.
>
> It declares who are citizens.
>
> It does not affect any political right, as that of suffrage, the right to sit on juries, hold office, &c. This it leaves to the States, to be determined by each for itself. It does not confer any civil right, but so far as there is any power in the States to limit, enlarge, or declare civil rights, all these are left to the States. But it does provide that as to certain enumerated civil rights every citizen "shall have the same right in every State and Territory." That is whatever of certain civil rights may be enjoyed by any shall be shared by all citizens in each State, and in the Territories, and these are:
>
> 1. To make and enforce contracts.
>
> 2. To sue, to be sued, and to be parties.
>
> 3. To give evidence.
>
> 4. To inherit, purchase, lease, sell, hold, and convey real and personal property.
>
> 5. To be entitled to full and equal benefit of all laws and proceedings for the security of person and property.

Id. at 1832 (Rep. Lawrence).

In these circumstances, it would be little short of astounding if Congress were to have intended by § 3 of the Act to require that the federal courts adopt, and be bound by, the very discriminatory state practices which the legislation was intended to invalidate. Rather, the conditional phrase, "so far as the same is not inconsistent with the Constitution and laws of the United States," was designed to guard against this result. The language was purposefully inserted into § 3 of the Act to authorize the creation of such *federal* law as might be necessary to carry out the broad purposes of the statute, as this Court recognized in *Sullivan*.[12]

Petitioner apparently would reduce this language, and Congress' understanding of it, to a nullity, for his brief says:

> The referral to and adoption of state law under the second part of Section 3 was never the subject of any debate whatever, [footnote omitted] since obviously it was deemed to constitute a recognition of the law of the forum state as controlling. What a furor would have resulted if any member of Congress had even suggested that a federal court could refuse to apply the pertinent state law under Section 3, and instead formulate a federal common law of survivorship of actions under the Civil Rights Act!

Pet. Br. at 12-13. Not only is this interpretation of the statute inconsistent with the very thesis of the 1866 Civil Right Act, as demonstrated above, but it is also factually inaccurate. The "federal common law" aspects of § 3 may not have been the focus of debate, but they did not go unnoticed by opponents of the bill. When it

[12] It is precisely in this sense, we submit, that § 1988 "was designed to supplement but not supplant the Rules of Decision Act." *Baker* v. *F&F Inv.*, 420 F.2d 1191, 1196 (7th Cir.), *cert. denied*, 400 U.S. 821 (1970). Even under that statute, as we show *infra* pp. 17-22, federal courts are not bound to apply state law which is inconsistent with federal interests.

came before the House of Representatives, Representative Kerr attacked the provision bitterly:

> I might go on and in this manner illustrate the practical working of this extraordinary measure. But I have said enough to indicate the inherent viciousness of the bill. It takes a long and fearful step toward the complete obliteration of State authority and the reserved and original rights of the States. . . . Then the things attempted to be prohibited are in themselves so extraordinary and anomalous, so unlike anything ever attempted before by the Federal Government, that the authors of this bill feared, very properly too, that the system of laws heretofore administered in the Federal courts might fail to supply any precedent to guide the courts in the enforcement of the strange provisions of this bill, and not to be thwarted by this difficulty, they confer upon the courts the power of judicial legislation, the power to make such other laws as they may think necessary. Such is the practical effect of the last clause of the third section, which reads as follows:
>
> . . . [text of statute omitted]
>
> That is to say, the Federal courts may, in such cases, make such rules and apply such law as they please, and call it *common law*.

CONG. GLOBE, 39th Cong., 1st Sess. 1271 (1866) (emphasis in original). Indeed, this was one of the grounds upon which President Andrew Johnson vetoed the measure, although his action was subsequently overridden by the Congress.

> It is clear that in States which deny to persons whose rights are secured by the first section of the bill any one of those rights, all criminal and civil cases affecting them, will, by the provisions of the third section, come under the exclusive cognizance of the Federal tribunals. It follows that if, in any State which denies to a colored person any one of all those rights,

that person should commit a crime against the laws of the State, murder, arson, rape, or any other crime, all protection and punishment through the courts of the State are taken away, and he can only be tried and punished in the Federal courts. How is the criminal to be tried? If the offense is provided for and punished by Federal law, that law, and not the State law, is to govern.

It is only when the offense does not happen to be within the purview of the Federal law that the Federal courts are to try and punish him under any other law. Then resort is to be had to "the common law, as modified and changed" by State legislation, "so far as the same is not inconsistent with the Constitution and laws of the United States." So that over this vast domain of criminal jurisprudence, provided by each State for the protection of its own citizens, and for the punishment of all persons who violate its criminal laws, Federal law, wherever it can be made to apply, displaces State law.

Veto Message of President Andrew Johnson, printed in *id.* at 1680 (1866).

Notwithstanding these protestations, the 1866 Act became law, in part for the purposes of avoiding reliance on state courts to enforce federal rights. *See, e.g., id.* at 602 (Sen. Lane).

Unquestionably, as Petitioner observes, § 1988 directs federal courts in civil rights actions to examine state law provisions upon an initial determination that federal statutes, or rules promulgated pursuant to federal statute, do not address procedural or remedial issues arising in those actions. And where state law is adequate to vindicate fully the constitutional rights which are the subject of the litigation, § 1988 clearly authorizes its use. But this is not the limit of § 1988; nor does the fact that state survival statutes were found adequate in *Brazier* v. *Cherry*, 293 F.2d 401 (5th Cir. 1961); *Pritch-*

ard v. *Smith*, 289 F.2d 153 (8th Cir. 1961); *Hall* v. *Wooten*, 506 F.2d 564 (6th Cir. 1974); *Dean* v. *Shirer*, 547 F.2d 227 (4th Cir. 1976); and *Spence* v. *Staras*, 507 F.2d 554 (7th Cir. 1974) indicate any conflict between those decisions and the ruling below in this case, as Petitioner suggests. Petition for Certiorari, at 6-10; *see* Pet. Br. 16-17.[13] In numerous cases, federal courts have

[13] Petitioner has cited no case in which state survival laws were applied to defeat a federal civil rights action. The description in Pet. Br. 15 n.11 is simply in error. *Holmes* v. *Silver Cross Hosp. of Joliet*, 340 F. Supp. 125 (N.D. Ill. 1972) was a suit against a court-appointed conservator, a hospital, and doctors on its staff, alleging infringement of plaintiff's freedom of religion by administration of a blood transfusion without his consent. The court concluded that the survival of the action under Illinois law depended on whether the defendants were acting "under color of state law." 340 F. Supp. at 129. It dismissed the court-appointed conservator from the lawsuit on the ground that he shared in the Illinois courts' judicial immunity in a § 1983 lawsuit (*see Pierson* v. *Ray*, 386 U.S. 547 (1967)). 340 F. Supp. at 131. All other defendants were found to have acted under color of state law, and the court concluded that by applying Illinois survival statutes the action could be maintained by decedent's administrator. *Id.* at 134, 135-36.

In *Evain* v. *Conlisk*, 364 F. Supp. 1188 (N.D. Ill. 1973), *aff'd without opinion* 498 F.2d 1403 (7th Cir. 1974), the decedent's daughter brought a § 1983 action to recover damages for the alleged wrongful killing of her father by Chicago police officers. The court held that the complaint stated no cause of action on behalf of the plaintiff individually, for the same reasons given by this Court in dismissing the writ of certiorari last Term in *Jones* v. *Hildebrant, supra.* (The court did not hold, as Petitioner suggests, that there was such a claim but that it did not survive under Illinois law.) Further, the court recognized that Illinois' "wrongful death" statute permitted "survival" of an action on behalf of decedent's estate for damages. However, it held that plaintiff could not maintain the suit because the appropriate statute of limitations period had long passed before litigation was commenced. *Id.* at 1191. *See Ingram* v. *Steven Robert Corp.*, 547 F.2d 1260, 1262 (5th Cir. 1977) for an instructive comparison of policies applied under § 1988 with respect to statutes of limitation and survival or wrongful death statutes.

It is true that in *Holmes* and some of the cases cited in text, there is *dictum* to the effect that state law is controlling on questions of wrongful death and survival. However, in all of these cases,

exercised the power granted by § 1988 to utilize procedural and remedial rules other than those embodied in state law.

For example, in *Davis* v. *Johnson*, 138 F. Supp. 572, 575 (N.D. Ill. 1955), the court found in § 1988 a directive to extend "suitable remedies," and—relying in part on maritime precedents—construed § 1983 to permit an action by the administratrix of a decedent whose death resulted from the alleged constitutional violation. In *Basista* v. *Weir*, 340 F.2d 71, 86-87 (3d Cir. 1965), the court held that punitive damages could be awarded in a § 1983 action under federal common law principles, although unavailable in a state court action. Similarly, following this Court's ruling in *Sullivan*, *supra*, the court in *Lee* v. *Southern Home Sites Corp.*, 429 F.2d 290, 294 (5th Cir. 1970) held that punitive damages could be awarded in a § 1982 cause of action without examining state law on the question. *See also*, *Johnson* v. *Greer*, 477 F.2d 101, 106 (5th Cir. 1973) (referring to "the prevailing view [of tort law on proximate cause] in this country" to determine proper federal rule in § 1983 case); *Young* v. *ITT*, 438 F.2d 757, 760 (3d Cir. 1971) (damages available in § 1981 employment discrimination suit); *Ambrose* v. *Wheatley*, 321 F. Supp. 1220, 1221 n.1 (D. Del. 1971) (punitive damages); *United States ex rel. Washington* v. *Chester County Police Dep't*, 300 F. Supp.

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either state law was found adequate to permit federal civil rights actions to be pursued, or some other ground for dismissal was present. The courts have recognized that the breadth of interests protected by § 1983 extend beyond narrow state law tort and contract categories, and require generous interpretation of state survival statutes. *E.g.*, *Dean* v. *Shirer*, *supra*, 547 F.2d at 229-30. *Cf. Monroe* v. *Pape*, 365 U.S. 167, 196 (1961) (Harlan, J., concurring). In many cases, including those cited in the following paragraph in text, courts have freely ventured beyond state law to give effect to the underlying policies of the civil rights acts. There is little support in the lower court holdings for Petitioner's confined reading of § 1988.

1279, 1282 (E.D. Pa. 1969) (§ 1981 damage action for police brutality; alternative holding).

The sum of the existing jurisprudence is that § 1988 requires no slavish adherence to provisions of state law but permits its rejection, and the fashioning or application of interstitial federal common law, in order to provide complete justice under the Civil Rights Acts.

B. *The same flexibility characterizes the practice of the courts in all federal question litigation with respect to application of state law; this flexibility is entirely consistent with the Rules of Decision Act and inheres in the constitutional grant of jurisdiction.*

Even without § 1988, and its explicit conditional language, state law would serve as a reference point in federal question litigation on matters not controlled by federal rule or statute; however, its use would not be obligatory but would depend on the circumstances and the effect on federal interests. This relationship between state and federal law follows logically from the limited constitutional grant of jurisdiction to the Courts of the United States, the uniquely *federal* linkage of states and nation, and the function of state law as a source of rules governing primary conduct.

The Constitution provides for the judicial Power of the United States, extending, *inter alia*, to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made . . . ." U.S. CONST., art. III, § 2, cl. 1. Inherent in this grant of judicial authority to the national government is the power to determine the principles of law applicable to cases upon which the judicial Power acts. Thus, in the absence of statute, federal courts would have been obliged to exercise the interpretive authority of a court of common law to determine questions arising in the course of federal case liti-

gation.[14] This power was limited by § 34 of the Judiciary Act of 1789, 1 Stat. 92 (the Rules of Decision Act), which provided that

> . . . the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.[15]

However, the Rules of Decision Act has never been interpreted to mandate unswerving application of state law to every matter not explicitly determined by federal statute or rule.[16]

In *Robinson* v. *Campbell*, 16 U.S. (3 Wheat.) 212 (1818), an ejectment action arising under an interstate compact, this Court held that the Rules of Decision Act had to be construed in accordance with other provisions of federal law. Since Congress had provided for federal court proceedings in equity in the first Judiciary Act, the Court refused to apply state law, inconsistent with

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[14] Similarly, in the absence of statute, the Courts of the United States would possess inherent judicial authority to regulate their own procedures. For example, although the Judiciary Act of 1789 did not grant explicit rulemaking authority to this Court (*compare* § 2, Act of May 8, 1792, 1 Stat. 275, 276, authorizing this Court to prescribe forms and modes of proceedings to district and circuit courts), in August of 1792 the Court announced that it "consider[ed] the practice of the courts of *King's Bench* and *Chancery* in *England*, as affording outlines for the practice of this court; and that [it] will, from time to time, make such alterations therein, as circumstances may render necessary." 2 U.S. (2 Dall.) 411-14 (1792).

[15] The Rules of Decision Act is now codified at 28 U.S.C. § 1652.

[16] In *Marbury* v. *Madison*, 5 U.S. (1 Cr.) 137, 162-63 (1803), Chief Justice Marshall relied upon Blackstone's COMMENTARIES to imply the existence of a judicial remedy from a United States statute considered to grant a legal right, but silent on the subject of remedy.

equity jurisdiction, pursuant to the Rules of Decision Act. *Id.* at 222-23 (alternative holding). Since then, in innumerable cases involving federal questions, this Court has determined that the substantive principles of federal law require, in exception to the Rules of Decision Act, the development and application of "interstitial" federal common law. *E.g.*, *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972); *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 338 (1971); *J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964); *Local 174* v. *Lucas Flour Co.*, 369 U.S. 95 (1962); *Farmers Educ. Coop. Union* v. *WDAY*, 360 U.S. 525 (1959); *McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221 (1958); *Textile Workers Union* v. *Lincoln Mills*, 363 U.S. 448 (1957); *National Metropolitan Bank* v. *United States*, 323 U.S. 454 (1945); *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210 (1944); *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943); *Sola Elec. Co.* v. *Jefferson Elec. Co.*, 317 U.S. 173 (1942); *Jackson County* v. *United States*, 308 U.S. 343 (1939); *see generally Monaghan, The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

The standards of § 1988 as well as the Rules of Decision Act were perceptively summarized in this language from a § 1983 decision:

> . . . our Court of Appeals has concluded that § 1988 was designed to supplement but not supplant the Rules of Decision Act and is applicable only when federal substantive law is not suitably adapted or sufficient to provide an appropriate remedy and the states have *remedial* provisions of law which, if applied, will help achieve the goals desired by the Civil Rights Act. Baker v. F&F Investment Company, 420 F.2d 1191, 1193-1197 (7th Cir. 1970), cert. denied, Universal Builders, Inc. v. Clark, 400 U.S. 821, 91 S. Ct. 40, 27 L. Ed. 2d 49 (1970). After reviewing the legislative history behind the Rules of Decision

> Act and § 1988, the Court there concluded that the Rules of Decision Act requires the application of state law in federal question suits where Congress has not specifically legislated on the particular aspect of law covered by the state law and where no uniform federal common law is felt by the courts to be required, and if application of the state law does not deny or conflict with the very right to relief created by the federal law.

Luker v. *Nelson*, 341 F. Supp. 113, 116 (N.D. Ill. 1972) (emphasis in original). Thus, it is the nature of federal interests affected in any instance which determines the extent to which state law shall apply, not any mechanical application of the Rules of Decision Act. *Compare United States* v. *Yazell*, 382 U.S. 341 (1966) (Texas law of coverture applies to Small Business Administration loan agreements) *with United States* v. *Carson*, 372 F.2d 429 (6th Cir. 1967) (Tennessee limitation on damages would not be applied to government suit for conversion of property secured by mortgage executed in connection with Bankhead-Jones Farm Tenant Act loan).

Just a few Terms ago, this Court reemphasized the choice-of-law authority allowed courts in federal question litigation [17] by the Rules of Decision Act. In *United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580 (1973), the government brought an action to quiet title to parcels of land in Louisiana. The issue decided by this Court was whether Louisiana law applied to determine the validity or extinguishment of prior reservations of mineral rights in the act of sale and judgment of condemnation by which

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[17] Existence of the same authority under the Rules of Decision Act in diversity cases has been suggested. *See Atkins* v. *Schmutz Mfg. Co.*, 435 F.2d 527 (4th Cir. 1970), *cert. denied*, 402 U.S. 932 (1971) and discussion of the case in Redish and Phillips, *Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356, 378-80, 391-92 n.189 (1977). That question is neither presented nor implicated in the case before the Court.

the government acquired the land. State law has always had a singular importance with respect to real property matters, and the Court of Appeals had accepted application of the Louisiana rule, finding that it was nondiscriminatory with respect to the United States as a party to a land transaction. *Id.* at 584-85. In his opinion reversing that judgment, the Chief Justice observed:

> . . . The Court of Appeals['] . . . opinion seems to say that state law governs this land acquisition because, at bottom, it is an "ordinary" "local" land transaction to which the United States happens to be a party. The suggestion is that this Court's decision in *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), compels application of state law here because the Rules of Decisions Act, 28 U.S.C. § 1652, requires application of state law in the absence of an explicit congressional command to the contrary. We disagree. The federal jurisdictional grant over suits brought by the United States is not in itself a mandate for applying federal law in all circumstances. This principle follows from *Erie* itself, where, although the federal courts had jurisdiction over diversity cases, we held that the federal courts did not possess the power to develop a concomitant body of general federal law. . . . It is true, too, that "[t]he great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state." *Davies Warehouse Co.* v. *Bowles*, 321 U.S. 144, 155 (1944). Even when federal general law was in its heyday, an exception was carved out for local laws of real property. . . .
>
> Despite this arguable basis for its reasoning the Court of Appeals in the instant case seems not to have recognized that this land acquisition, like that in *Leiter Minerals*, is one arising from and bearing heavily upon a federal regulatory program. Here,

the choice-of law task is a federal task for federal courts, as defined by *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943). Since *Erie*, and as a corollary of that decision, we have consistently acted on the assumption that dealings which may be "ordinary" or "local" as between private citizens raise serious questions of national sovereignty when they arise in the context of a specific constitutional or statutory provision; particularly is this so when transactions undertaken by the Federal Government are involved, as in this case. In such cases, the Constitution or Acts of Congress "require" otherwise than that state law govern of its own force.

There will often be no specific federal legislation governing a particular transaction to which the United States is a party; here, for example, no provision of the Migratory Bird Conservation Act guides us to choose state or federal law in interpreting federal land acquisition agreements under the Act. But silence on that score in federal legislation is no reason for limiting the reach of federal law, as the Court of Appeals thought in *Leiter Minerals*. To the contrary, the inevitable incompleteness presented by all legislation means that interstitial federal lawmaking is a basic responsibility of the federal courts. "At the very least, effective Constitutionalism requires recognition of power in the federal courts to declare, as a matter of common law or 'judicial legislation,' rules which may be necessary to fill in interstitially or otherwise effectuate the statutory patterns enacted in the large by Congress. . . ."

Id. at 590-93 (footnotes omitted).[18]

[18] "[S]tate law is applied [under the Rules of Decision Act] only because it supplements and fulfills federal policy, and the ultimate question is what federal policy requires." *International Union* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 709 (1966) (White, J., dissenting).

That it is *federal* rights protected, and *federal* remedies afforded, by 42 U.S.C. § 1983, is beyond dispute. *See, e.g., Steffel* v. *Thompson*, 415 U.S. 452 (1974); *Lynch* v. *Household Fin. Corp.*, 405 U.S. 538 (1972); *Mitchum* v. *Foster, supra; Monroe* v. *Pape, supra*, 365 U.S. at 196 (Harlan, J., concurring). The *federal* interests thus established by the Civil Rights Acts would, even in the absence of § 1988, therefore, have to be taken into account in deciding whether to apply state law in Civil Rights Acts suits. Accordingly there can be no doubt of the power of federal courts to disregard state law in such suits if that course is deemed necessary to "effectuate the statutory pattern enacted in the large by Congress," and we turn to a consideration of the circumstances in which the exercise of the power is appropriate.

II

In This Case Louisiana's Limited Survival Of Actions Statute Was Properly Not Applied Because To Do So Would Conflict With The Remedial And Deterrent Purposes Of The Federal Civil Rights Acts.

We have shown above that courts entertaining federal civil rights actions are not invariably required to follow the provisions of state law on matters as to which the federal Civil Rights Acts are silent. Accordingly, we contend, the judgment below must be sustained unless this Court determines that the courts below used the wrong standards to decide whether Louisiana's survival statute should be applied to this case. We proceed, therefore, to articulate *first*, the considerations relevant to the choice-of-law decision; *second*, the policies and purposes which underlie the federal Civil Rights Acts in general, and the Ku Klux Act of 1871 (42 U.S.C. § 1983) in particular; and *third*, the reasons why we believe the correct result was reached in this case.

A. *Factors bearing upon the choice of law.*

It is worth reiterating, as a preliminary matter, that the authority to apply or reject state law is presented under either § 1988 or the Rules of Decision Act only on an interstitial basis, where federal statutory law is incomplete *and* silent about the source of decisional rules to fill any gaps. Neither we nor this case invite the Court to sanction, as it has consistently refused to do, a *general* common law. Where federal statutes direct unconditionally—as neither § 1988 nor the Rules of Decision Act do—that state law is to be incorporated as federal law, that is the end of the matter; there is no room nor need for "interstitial" federal common law. *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971).[19]

Analysis of this Court's choice-of-law rulings reveals two general categories of facts and circumstances which are taken into account.[20] The first may be called the "nature of the national interest." This encompasses such matters as: the presence of the United States, or an agency of the United States, as a party;[21] whether the substantive questions in the lawsuit involve the validity or consequences of activities of the United States or its agencies;[22] whether the decision of the substantive ques-

[19] *Cf. Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240 (1975) (Congressional enactment of various specific authorizations for the award of attorneys' fees by federal courts, against background of general statutory limitation of power to award fees, precluded judicial adoption of broad "private attorney general" theory).

[20] ". . . whether state law is to be applied . . . 'necessarily is dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state laws.'" *United States* v. *Little Lake Misere Land Co., supra*, 412 U.S. at 595, quoting from *United States* v. *Standard Oil Co.*, 332 U.S. 301, 309-10 (1947).

[21] *E.g., Clearfield Trust Co.* v. *United States, supra.*

[22] *E.g., Hughes* v. *Washington*, 389 U.S. 290 (1967).

tions will likely have a wide effect upon the conduct of a national regulatory or assistance program;[23] whether the litigation itself has been explicitly or implicitly sanctioned by the Congress as a means of effectuating national policy,[24] etc.

In general, the "stronger" the federal interest, the less likely it is that state laws will be found to apply. This does not mean, however, that state law is barred from consideration. The presence of an important federal interest is usually stated to be sufficient to require that "federal law" be applied to the substance of the case, but even then, as this Court has said, "[i]n our choice of the applicable federal rule we have occasionally selected state law." *Clearfield Trust Co.* v. *United States, supra*, 318 U.S. at 367. In some cases this is justified on the assumption "that Congress has consented to application of state law . . . [a]nd in still others state law may furnish convenient solutions in no way inconsistent with adequate protection of the federal interest." *United States* v. *Standard Oil Co.*, 332 U.S. 301, 309 (1947).

The second set of factors relates to the impact of applying state law: both its impact upon the case at hand and upon the federal interests which are involved in and affected by it. Aspects of this inquiry include: the ability of the national government to anticipate and meet state law requirements in the normal operations of its programs;[25] the availability of alternative mechanisms to satisfy the federal interest which are unaffected by the state law (including their likely effectiveness and the access of the parties to them);[26] the degree to which

[23] *E.g., United States* v. *Little Lake Misere Land Co., supra*, 412 U.S. at 597.

[24] *E.g., Textile Workers Union* v. *Lincoln Mills, supra.*

[25] *E.g., United States* v. *Yazell, supra.*

[26] *See United States* v. *93.970 Acres of Land*, 360 U.S. 328 (1959).

application of state law would abort, rather than merely alter, proceedings in the pending lawsuit,[27] etc.

These variegated concerns underscore our earlier point that the choice of law determination is far from automatic or mechanical. Diverse results flow from rational analysis of competing values in these cases. Distinctions are often founded upon the intensity of the national interest and the effect of state law upon the national policy, as the following examples illustrate.

We consider first suits directly touching or implicating governmental activities. In *Clearfield Trust Co.* v. *United States*, *supra*, the Court concluded that the interest of the government in a uniform national definition of its rights and duties was so great that federal, and not state, law would be applied to its transactions in commercial paper. This interest was found to be much more attenuated in *Bank of America* v. *Parnell*, 352 U.S. 29 (1956) (a diversity case); since there the Court also viewed application of state law to *private* transactions in commercial paper as having little impact upon the federal government, it rejected the *Clearfield* doctrine.

Similarly, in *D'Oench Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), the Court inferred from various statutes a protective policy toward the federal agency involved in the case, which it held required the application of federal and not state law. But where no need for such special solicitude was evidenced in federal legislation (or the Constitution or treaties), state law rules were permitted to determine, for example, the tax liability of a national agency in *Reconstruction Fin. Corp.* v. *Beaver County*, 328 U.S. 204 (1946) and the availability of interest on tax payments improperly exacted from Indians, which the United States sued to recover in *Board of County Comm'rs* v. *United States*, 308 U.S. 343 (1939).

[27] *E.g.*, *McAllister* v. *Magnolia Petroleum Co.*, *supra*.

A like pattern obtains in litigation between private parties in which important federal interests become entangled. In *Sola Elec. Co.* v. *Jefferson Elec. Co.*, *supra* (a diversity action), this Court ruled that a state estoppel rule could not be given effect to prevent presentation of a defense of illegality under the Sherman Act. On the other hand, no important federal policy issues were affected by the application of state law to determine the relations of private parties under a federal mineral lease in *Wallis* v. *Pan American Petroleum Corp.*, 384 U.S. 63 (1966). Federal law was held to govern tort liability in *Francis* v. *Southern Pac. Co.*, 333 U.S. 445 (1948) by virtue of an implied Congressional approval of the prestatutory common law rule; and to prescribe available defenses in *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946) because the underlying claim was a federally created *equitable* right held not subject to state rules of limitations.[28]

Statutes of limitations cases form a distinct body of law, primarily because the impact of applying state limitations (if any) is ordinarily confined to the litigation,

[28] *Cf. Robinson* v. *Campbell*, *supra*. The law applied in suits brought pursuant to § 301 of the Taft-Hartley Act, 29 U.S.C. § 185, also illustrates the point well. In *Textile Workers Union* v. *Lincoln Mills*, *supra*, 353 U.S. at 456, this Court announced that federal law, "which the courts must fashion from the policy of our national labor laws," would be the substantive law applied in suits under § 301 to enforce agreements to arbitrate between labor unions and management. *Charles Dowd Box Co.* v. *Courtney*, 368 U.S. 502 (1961) allowed such suits to be brought in state, as well as federal, courts—but in such instances, the Court held that same Term in *Local 174* v. *Lucas Flour Co.*, 369 U.S. 95 (1962), federal law must be applied. Yet even in this area in which federal concerns seemed to be paramount, the Court has ruled that there is room for flexibility, for diverse state laws. State statutes of limitation, the Court said in *International Union* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 701-03 (1966), could be applied in § 301 suits because "[l]ack of uniformity in this area is . . . unlikely to frustrate in any important way the achievement of any significant goal of labor policy." *Id.* at 702.

and does not affect federal interests or ongoing federal programs. *See, e.g., Cope* v. *Anderson*, 331 U.S. 460, 463-64 (1947) (state limitations period would be applied to equitable action to enforce federally created assessments on shareholders of insolvent national bank, although commencement of period is question of federal law); *International Union* v. *Hoosier Cardinal Corp., supra* n. 28; *but see McAllister* v. *Magnolia Petroleum Co., supra* (state limitation period could not be applied to unseaworthiness claims where it was shorter than federal Jones Act period, since federal law requires that both claims be prosecuted in a single action).

These choice-of-law principles are applicable to suits brought under the federal Civil Rights Acts. As we discuss in the next section, these statutes create important federal interests, recognized by this Court's ruling in *Sullivan* v. *Little Hunting Park, supra*, 396 U.S. at 239, that "[c]ompensatory damages for deprivation of a federal right are governed by federal standards, as provided by Congress in 42 U.S.C. § 1988 . . . ." [29] *See Hodge* v. *Seiler*, 558 F.2d 284, 287-88 (5th Cir. 1977) (as a matter of federal law, at least nominal damages must be awarded for violation of § 1982 right); *Pollard* v. *United States*, 384 F. Supp. 304, 307 n.2 and accompanying text (M.D. Ala. 1974) (state limitations period applies, but in determining commencement of period, federal—not state—rule with respect to fraudulent concealment governs); *Ingram* v. *Steven Robert Corp., supra*, 547 F.2d at 1262 n.2 and accompanying text (distinguishing between state statutes of limitation and survival statutes

[29] *Compare J.I. Case Co.* v. *Borak, supra*, 377 U.S. at 434: "But we believe that the overriding federal law applicable here would, where the facts required, control the appropriateness of redress despite the provisions of state corporation law, for it 'is not uncommon for federal courts to fashion federal law where federal rights are concerned.' *Textile Workers* v. *Lincoln Mills* . . . ."

based upon their impact); [30] *Gore* v. *Turner*, 563 F.2d 159, 164 (5th Cir. 1977) (in § 1982 action, court should have awarded punitive damages based upon "evaluation of the nature of the conduct in question, the wisdom of some form of pecuniary punishment, and the advisability of a deterrent to future illegal conduct"); *Miller* v. *Smith*, 431 F. Supp. 821 (N.D. Tex. 1977) (state tolling rule would not be followed in § 1983 case if its application would be inconsistent with purposes underlying federal cause of action).

Thus, in our view, decision of this matter hardly involves a special rule for civil rights actions; rather, the courts below applied traditional choice-of-law principles to the facts, taking into account the broad remedial and deterrent purposes of the federal Civil Rights Acts and the extent to which application of Louisiana's survival statute would frustrate those purposes.

B. *The remedial-deterrent purposes of the Civil Rights Acts.*

Any elucidation of the purposes of the federal Civil Rights Acts, and in particular of the provision of the 1871 Ku Klux Act which is now codified as 42 U.S.C. § 1983, must begin with the fundamental proposition that § 1983 creates a cause of action separate and apart from any state law. While the same conduct may give rise to a state-law tort or other liability, that fact is purely coincidental to the § 1983 liability created by conduct under color of state law which deprives an individual of constitutional rights. In recognition of this principle, and of the Reconstruction Congresses' desire to provide, in the federal Civil Rights Acts, remedies which are independent of the state-created procedures to vindicate constitutional rights, this Court has consistently held that there is no exhaustion requirement in § 1983 actions. *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973); *Damico* v. *California*,

[30] *Cf. Burnett* v. *New York Cent. R.R. Co.*, 380 U.S. 424 (1965).

389 U.S. 416 (1967); *McNeese* v. *Board of Educ.*, 373 U.S. 668 (1963); *Monroe* v. *Pape*, *supra*. Hence, there is no anomaly in the circumstance that the malfeasor may be required to respond to the injured party separately in tort under state law and in a federal cause of action for deprivation of constitutional rights. That result flows ineluctably from the federal nature of our nation. As Mr. Justice Harlan said, concurring in *Monroe* v. *Pape*, *supra*, 365 U.S. at 196, "a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right."

This central characteristic of the federal Civil Rights Acts is closely related to the important federal interests which they are intended to protect, and which must be given effect in actions brought thereunder. They are, first, designed to afford complete justice (independent, as we have said, of any other remedy) to those whose constitutional rights have been denied by state officers. *See Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 231-32 (1970) (Brennan, J., concurring in part and dissenting in part).[31] Thus, for example, this Court has held that in civil rights actions, damages may be awarded irrespective of state law provisions, *Sullivan* v. *Little Hunting Park*, *supra*, and that injunctions against state court proceedings may issue notwithstanding 28 U.S.C. § 2283, *Mitchum* v. *Foster*, *supra*. *See also*, *Albemarle Paper Co.* v. *Moody*,

[31] As we pointed out in the Brief for the Lawyers' Committee for Civil Rights Under Law, et al., as Amici Curiae in No. 76-5416, *Jones* v. *Hildebrant* [hereinafter, "*Jones Amici* Brief"] (see pp. 2-3 *supra*), at 36-37, federal civil rights legislation is part of a tradition stretching back to *Marbury* v. *Madison*, *supra*, whereby American law has fashioned remedies adequate to compensate those who are deprived of what the Constitution and laws guarantee them.

supra n. 7. But these statutes do more than authorize relief.

The constitutional provisions protecting individuals (both the specific protections of the Bill of Rights made applicable to actions of the states by the Fourteenth Amendment and the more general provisions embodied in the equal protection and due process guarantees) are more than remedial. As integral parts of the organic law of our nation, they directly regulate primary conduct. With respect to the conduct of state officials, the federal Civil Rights Acts establish *private litigation* as a principal instrument by which these constitutional provisions are to be implemented.[32] Hence that litigation must not only afford redress to those whose constitutional rights are invaded. If it is to be truly effective as a vehicle of Fourteenth Amendment policy, its sanctions must also be sufficiently credible and efficient to serve as a practical deterrent to illegal conduct.[33]

[32] "The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardian of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'" *Mitchum* v. *Foster*, *supra*, 407 U.S. at 242, quoting from *Ex parte Virginia*, 100 U.S. 339, 346 (1880). As the Court explained in *District of Columbia* v. *Carter*, 409 U.S. 418, 427 (1973):

> To the Reconstruction Congress, the need for some form of federal intervention was clear. It was equally clear, however, that Congress had neither the means nor the authority to exert any direct control, on a day-to-day basis, over the actions of state officials. The solution chosen was to involve the federal judiciary.

[33] As stated in Niles, *Civil Actions for Damages Under the Federal Civil Rights Statutes*, 45 TEX. L. REV. 1015, 1026 (1967):

> [T]he basic policy behind tort law is compensation for physical harm to an individual's person or property by shifting losses from the one injured to the one perpetrating the injury, while the underlying policy of the civil rights statutes is quite different. The legislative intent behind these statutes is not entirely certain since other provisions of the Act of 1871 received

The Reconstruction Congresses hoped that successful lawsuits for violation of constitutional rights, which they were authorizing to be brought in the federal courts, would not only compensate the victims of unconstitutional conduct but also provide effective warning to state officials inclined to disregard the commands of the Thirteenth and Fourteenth Amendments. The concept was well established in the common law. For example, in *Barry* v. *Edmunds*, 116 U.S. 550 (1886), one of the *Virginia Coupon Cases*, the Court sustained federal question jurisdiction in a suit against a local tax collector under the Contract Clause because punitive damages, allowable as a part of the federal common law applicable to the suit, might exceed the minimum jurisdictional amount. In the course of its opinion, this Court discussed English Cases recognizing the deterrence value of actions against officials who misuse their powers (*id.* at 566):

> The case of *Beardmore* v. *Carrington*, 2 Wils. 244, was an action of trespass and false imprisonment against the defendants, who were four of the King's messengers in ordinary. They justified the alleged

far more attention in congressional debate than did those that eventually became sections 1983, 1985, and 1986. One purpose of the Act apparently was to provide a federal forum for rights that the disorganized Southern state governments were not protecting adequately. It seems clear, however, from the statements of a few legislators, the title of the Act itself, and the circumstances surrounding its passage that the Act's primary purpose was to enforce the fourteenth amendment by providing a positive, punitive civil remedy for acts of racial discrimination. Thus an award of damages would depend not on the common-law test of whether a plaintiff had suffered a measurable physical or economic injury, but on whether the defendant's conduct came within the scope of actions that the statutes were intended to penalize. While traditional tort law damages rules may be appropriate to accomplish some of the civil rights statutes' purposes, the tort-law rules do no [*sic*] allow full realization of those purposes because of their emphasis upon loss-shifting rather than upon punishment and deterrence. [footnotes omitted]

> trespass under a warrant of the Earl of Halifax, then one of the principal Secretaries of State, requiring them to arrest the plaintiff as the author of some seditious libels and to seize his books and papers. There was a verdict for the plaintiff for £1,000 damages, and a motion for a new trial on the ground that the damages were excessive. The court (Pratt, afterwards Lord Camden, being *Lord Chief Justice*) said: "Can we say that £1,000 are monstrous damages as against him who has granted an illegal warrant to a messenger, who enters into a man's house and prys into all his secret and private affairs, and carries him from his house and business and imprisons him for six days? It is an unlawful power assumed by a great minister of state. Can anybody say that a guinea *per diem* is sufficient damages in this extraordinary case, which concerns the liberty of every one of the King's subjects? We cannot say the damages of £1,000 are erroneous." The dignity and value of the right assailed, and the power and authority of the source from which the assault proceeds, are elements to be considered in the computation of damages, if they are to be, not only compensation for the direct loss inflicted, but a remedy and prevention for the greater wrong and injury involved in the apprehension of its repetition.

The combination of remedial and deterrent goals in federal statutes creating causes of action is not uncommon. Recently construing such a statute (the Clayton Act), this Court allowed foreign governments to bring actions under the law in order to preserve "the maximum deterrent effect of treble damages upon all potential violators." *Pfizer, Inc.* v. *Government of India*, 46 U.S.L.W. 4073, 4075 (January 11, 1978) (footnote omitted).[34]

[34] *See also Gore* v. *Turner*, *supra*, 563 F.2d at 164: "Because of the seriousness of the defendant's conduct, this Court directs the district court to award punitive damages to deter the defendant

Thus, we perceive the federal Civil Rights Acts, passed in the exercise of Congress' authority under the Thirteenth and Fourteenth Amendments, to create two principle *federal interests* in lawsuits brought under them: first, that individuals denied their constitutional rights by state officials or others acting under color of state law be fully compensated, and second, that the federal remedy be maximally effective in order to deter those wielding state power from using it in contravention of federal constitutional guarantees.

C. *Abatement of this action by reason of Clay Shaw's untimely death would be inconsistent with Congress' purposes in creating the § 1983 cause of action.*

We come, ultimately, to the precise issue in this case: whether the lower courts correctly applied the factors identified above, in relation to the purposes of the federal Civil Rights Acts delineated above, when they concluded that the provisions of Louisiana's survival statute should not cause this action to abate. We submit that they did.

The entire discussion heretofore establishes, we believe, that there is no simplistic answer to this question. Courts

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from such conduct in the future"; *Rodriguez* v. *Taylor*, No. 76-2609 (3d Cir., December 27, 1977), slip op. at p. 9:

> The "amounts owing" to a victim of age discrimination are not further defined by statute. Thus, the scope of pecuniary relief available under the ADEA must be ascertained from examination of the whole statutory scheme. Damage standards should effectuate the purposes of antidiscrimination statutes. *See generally Rogers* v. *Exxon Research & Engineering Co.*, 550 F.2d 834, 839-42 (3d Cir. 1977).
>
> Monetary awards exacted from employers who practice unlawful discrimination serve two primary functions. First, the prospect of economic penalties more certainly deters illegal employment practice than does exposure to injunctive relief or prospective equitable remedies such as reinstatement. Second, economic exactions recompense individuals for injuries inflicted by employers' discriminatory conduct.

are no more precluded from rejecting state survival statutes because the federal Civil Rights Acts are silent on the subject (*see* Pet. Br. at 10-11) than they are precluded from awarding damages because the Acts do not expressly mention them. *Sullivan* v. *Little Hunting Park, supra.* Nor does the fact that 42 U.S.C. § 1986 contains a survival provision establish any congressional policy with respect to survival of other civil rights suits. (*See* Pet. Br. at 11, 13, 26.)[35] Rather, the task is to determine how the federal and individual interests may best be accommodated.

Unlike statutes of limitations, whose purpose is to provide assurance that one will not be held to answer for conduct long past, and which therefore create cognizable interests in persons who may be made parties defendant in federal civil rights actions,[36] survival statutes (at least as they arise in this case) serve no interest in repose: the action has already been brought and defendants called upon to answer for their conduct.[37] Abate-

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[35] As we have demonstrated in the *Jones Amici* Brief, at pp. 24-31, even if the legislative history surrounding rejection of the Sherman Amendment and passage of § 1986's predecessor were much clearer, it would be more than the process of implication can bear to view § 1986 as even an indication that survival of civil rights actions is inconsistent with congressional intent. Petitioner seems not to recognize that this logic would invalidate decisions such as *Brazier* v. *Cherry, supra*, and *Pritchard* v. *Smith, supra*, cases with which he does not quarrel.

[36] Even with respect to such matters, courts have employed federal tolling rules consistent with the purposes underlying the Civil Rights Acts to avoid injustice which would result from applying state statutes of limitations. *E.g., Mizell* v. *North Broward Hosp. Dist.*, 427 F.2d 468, 474 (5th Cir. 1970); *Pollard* v. *United States, supra; see also Miller* v. *Smith, supra* (state tolling rule would not be applied to sustain timeliness of federal suit since court construed federal policy to require prompt resort to judicial remedy).

[37] For purposes of the decision in this case, the allegations of the complaint that Shaw's constitutional rights were violated must be taken as true. Application of the procedural rule for which Peti-

ment of the litigation before trial because of the death of the plaintiff cuts off all opportunity to prove the claim. Whatever may be the justification for allowing this result in litigation to enforce state-created tort interests (*see* note 33 *supra*), there is no adequate reason to permit the vindication of constitutional rights, and the deterrence of unconstitutional conduct, to be impeded because of the death of one who claimed denial of his rights. Such a result is wholly inconsistent with the purposes of the federal Civil Rights Acts.

In our *Jones Amici* Brief (*see* note 31 *supra*), at pp. 18-36, we showed that the courts are authorized to entertain § 1983 wrongful death suits involving alleged unconstitutional police misconduct or brutality without regard to the specific provisions of state statutes—although § 1988 permits "borrowing" those statutes if they further the purposes of the federal cause of action. That conclusion flows, as we demonstrated, from the broad remedial and deterrent purposes of the federal Civil Rights Acts. We also argued (pp. 36-44) that restrictive damages limitations of state wrongful death laws do not bind even those courts which "borrow" the statutes in § 1983 claims, again because such limitations are inconsistent with the "complete justice" theme of the Reconstruction statutes. The present case involves an even harsher result than in *Jones*. There, if Mrs. Jones had brought an action to recover damages for the injuries to and death of her son,[38] she could at least have recovered compensation for any actual pecuniary losses, up to a maximum of $45,000. *See Jones Amici* Brief, p. 5. Here, whether or not the Petitioner and other defendants in the action conspired to deprive Shaw of his constitutional rights, all chance to vindicate those rights or to prove consequential

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tioner contends would cause dismissal of civil rights actions without regard to their underlying merit.

[38] *See* note 2 *supra*.

losses would be barred by the fortuitous circumstance of Shaw's death.

The rule advanced by Petitioner would not be limited to cases in which death was apparently unrelated to the actions constituting a deprivation of constitutional rights (*see* Pet. Br. at 8 n.3). It would apply equally to an individual who was brutally beaten to death by state officials, but who did not happen to be survived by "spouse, children, parents, [o]r siblings." The opportunity for that individual's estate—or (indirectly) for a creditor of the estate—to show that recoverable loss resulted from that beating would be forever extinguished if courts in § 1983 suits may not displace a state survival statute like Louisiana's. (As one court has said, this result "would encourage officers not to stop after they had injured but to be certain to kill." *Davis* v. *Johnson*, *supra*, 138 F. Supp. at 574.) Consider the following hypothetical situation, slightly different from the facts here but, we submit, entirely plausible:

If Clay Shaw had been severely beaten, without cause, by the defendants; had survived for six months in the Intensive Care Unit of a New Orleans hospital, drifting in and out of a coma; had authorized his attorney to file a § 1983 damages action against the defendants during a conversation while in the hospital, and that suit was promptly filed; had incurred hospital and medical charges of more than $150,000 because of extraordinary efforts made to save his life; had executed a valid will leaving his residuary estate to an orphaned nephew for the latter's college education; but had not been survived by a spouse, child, parent or sibling; even then, under Petitioner's view of the applicable law, Shaw's § 1983 damage suit would abate. The anticipated bequest to his nephew, and the nephew's college education, might vanish. And if the estate were insufficient, the hospital and doctors might

have no way of being paid for their services. But the point is not whether a particular kind of potential claimant with a particular kind of loss exists; violations of constitutional rights harm interests shared by everyone. The most serious consequence of abatement, for § 1983 purposes, is that defendants might escape any liability for their unconstitutional actions unless the United States brought criminal charges against them.

We respectfully submit that these facts are neither far-fetched nor materially different from the case at bar. Clay Shaw brought this action before his death, alleging that the defendants (including Petitioner) conspired to deprive him of his constitutional rights. He alleged that because of the defendants' actions he was required to spend considerable sums defending himself against groundless prosecutions on a charge of seeking to murder President John F. Kennedy. He did execute a valid will naming a residuary legatee, and he did die without being survived by a spouse, child, parent, or sibling. Surely there is no better reason for abating Shaw's attempt to vindicate his constitutional rights under these circumstances than there would be if he had died from a beating allegedly administered by the defendants. As a matter of federal policy it is equally important in the former instance that the action survive, since federal judicial intervention to halt ongoing state proceedings such as those initiated by defendant Garrison is so rarely available. *Younger* v. *Harris*, *supra*; *Samuels* v. *Mackell*, *supra*; *Shaw* v. *Garrison*, *supra*, 293 F. Supp. 937 (E.D. La.), *aff'd* 393 U.S. 220 (1968).

Petitioner also suggests that the courts below erred in failing to adopt, as the federal common law to be applied in this case, various federal survival statutes in other fields which are similar to Louisiana's (Pet. Br. at 22). In this respect, Petitioner's argument at least addresses

the proper question in the case. However, once again we believe that consideration of the purposes of the federal Civil Rights Acts dictates affirmance of the judgment below.

It is by no means self-evident that the survival provisions of the Federal Employers Liability Act, the Longshoremen's and Harbor Workers' Compensation Act, and the Death on the High Seas Act, should be applied in federal civil rights cases. In *Complaint of Cambria S.S. Co.*, 505 F.2d 517 (6th Cir. 1974), *cert. denied*, 420 U.S. 975 (1975), cited by Petitioner,[39] the court did hold that neither a decedent's estate nor a non-dependent brother could bring the wrongful death admiralty action which this Court created in *Moragne* v. *States Marine Lines*, *supra*. However, the Sixth Circuit expressly rejected the argument that it should "simply borrow the schedule of beneficiaries from the Death on the High Seas Act." Instead, the court "endeavored . . . to develop a uniform body of federal law, neither borrowing automatically from federal statutory provisions, nor applying any particular state law." *Id.*, 505 F.2d at 521. The court reviewed the holdings in *Moragne* and *Sea-Land Services* v. *Gaudet*, 414 U.S. 573 (1974), and concluded that "the liberal and humanitarian character of maritime proceedings as expressed in *Moragne* and *Gaudet*, *supra*, contemplates solicitude for dependents, not inanimate estates." *Id.* at 523. Similarly, the court said, "[t]he mere accident of blood relationship with nothing more does not itself call for that special solicitude which the maritime law holds for those injured within its jurisdiction." *Id.* at 525. The Sixth Circuit declined to permit the estate to sue, as would have been permitted by some state laws, because this "fundamentally punitive approach is inconsistent with the expressed compensatory philosophy of the maritime law." *Id.* at 522.

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[39] Pet. Br. at 24.

This approach leads to different results in the instant case. As we have previously noted, the federal Civil Rights Acts have a twofold purpose: compensation for the victim and deterrence/punishment for the wrongdoer. These statutes are consistent with the common law tradition authorizing the award of punitive damages for official misconduct. *See* pp. 32-33 *supra*. There is no reason to cut off the right of a decedent's estate to maintain an action under these statutes just because the plaintiff is survived by no dependent beneficiaries. Furthermore, the loss-shifting rationale of tort and maritime law is designed to shift the burden of economic inquiry for negligence (or unseaworthiness) in an area of activity which is itself legal, and in which accidents and injury may, unfortunately, be expected to occur with regularity.[40] The goal of the federal Civil Rights Act, however, is to assure that unconstitutional conduct (itself clearly unlawful) does not occur at all, and that individuals injured by its occurrence are compensated. These ends are ill-served by application of Louisiana's survival statute to this action, and the courts below acted properly in allowing the suit to continue with the substitution of Shaw's executor as a plaintiff.

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[40] *See* note 33 *supra*.

CONCLUSION

For the foregoing reasons, *amicus* respectfully submits that the judgment below should be affirmed.

Respectfully submitted,

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